Chin Sin Lan v Delta Finance Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q–03–11 OF 2001
GOPAL SRI RAM, ALAUDDIN MOHD SHERIFF AND RICHARD MALANJUM JJCA
9 OCTOBER 2002

Bankruptcy — Practice and procedure — Bankruptcy notice and petition — Bankruptcy proceedings — Judgement obtained more than six years ago — Whether leave of court required to commence bankruptcy proceedings

Bankruptcy — Practice and procedure — Bankruptcy notice and petition — Bankruptcy proceedings — Leave to issue execution more than six years after judgment — Whether bankruptcy proceedings comes within definition of 'suit' — Sarawak Limitation Ordinance

Bankruptcy — Practice and procedure — Bankruptcy notice and petition — Deficiencies in mathematical calculation of sum said to be due and payable — When should objection raised

Civil Procedure — Execution — Leave to issue execution more than six years after judgment — Whether execution proceedings comes within definition of suit — Items 97 and 98 to Schedule of Sarawak Limitation Ordinance

On 23 September 1992, the respondent obtained judgment against the appellant for a sum of RM5,283.45 together with interest on that sum at 1.5% per month. On 5 October 1999, the respondent took out a bankruptcy notice. The foundation for that notice was the judgment already averted to. But by October 1999, the sum owing on that judgment, according to bankruptcy notice was RM12,345.72. On 6 March 2000, the respondent presented a creditor's petition. The appellant then gave notice under r 117 of the Bankruptcy Rules 1969 of his intention to oppose the respondent's petition. The deputy registrar, after hearing arguments, granted the petition. The appellant then appealed to the judicial commissioner in chambers. The judicial commissioner dismissed the appeal and affirmed the order of the registrar. The appellant now appealed to the Court of Appeal on the grounds among others that the bankruptcy proceedings were caught by the limitation period and in relation to the propriety of the bankruptcy proceedings, that there were deficiencies in the mathematical calculation of the sum said to be due and payable by the appellant.

Held, dismissing the appeal:

(1) A creditor who has obtained a judgment and sat on it for more than six years in West Malaysia must obtain leave of court before he could commence bankruptcy proceedings under s 3(1)(i) of the Bankruptcy Act 1967 (see para 14).

(2) Item 97 and 98 to the Schedule of the Sarawak Limitation Ordinance which refer to suits, include execution proceedings. In other words, an execution proceeding upon a judgment in the State of Sarawak is caught by the limitation period prescribed by the appropriate item. Further, bankruptcy proceedings are not execution proceeding and do not

therefore come within the definition of 'suit' as defined by the Sarawak Limitation Ordinance. (see para 21).

(3) Bankruptcy proceedings are not execution proceedings and do not therefore come within the definition of 'suit' as defined by the Sarawak Limitation Ordinance (see para 22); *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508 followed.

(4) The remaining point which was to do with propriety of the bankruptcy proceedings, namely bankruptcy notice and petition in the present instance were not in order because there were deficiencies in the mathematical calculation of the sum said to be due and payable by the appellant, it was too late in the day for the appellant to raise. It should have been taken and challenged at the bankruptcy notice in the appropriate way prescribed by the Bankruptcy Rules 1969 (see para 25); *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298 and *J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177 followed.

[**Bahasa Malaysia summary**

Pada 23 September 1992, responden telah mendapat penghakiman terhadap perayu untuk jumlah RM5,283.45 beserta faedah pada kadar 1.5% sebulan. Pada 5 Oktober 1999, responden telah mengemukakan notis kebankrapan. Asas notis tersebut adalah penghakiman yang telah dinyatakan. Tetapi pada bulan Oktober 1999, jumlah yang terhutang akibat penghakiman tersebut, mengikut notis kebankrapan adalah RM12,345.72. Pada 6 Mac 2000, responden telah mengemukakan satu petisyen pemiutang. Perayu kemudian memberi notis di bawah k 117 Kaedah-Kaedah Kebankrapan 1969 mengenai hasrat beliau untuk menentang petisyen responden. Timbalan pendaftar, selepas berhujah, membenarkan petisyen tersebut. Perayu kemudian merayu kepada pesuruhjaya kehakiman dalam kamar. Pesuruhjaya kehakiman tersebut telah menolak rayuan tersebut dan mengesahkan perintah pendaftar tersebut. Perayu sekarang merayu kepada Mahkamah Rayuan atas alasan antara lain bahawa tindakan kebankrapan terbatas oleh tempoh had masa dan mengenai kebenaran tindakan kebankrapan, terdapat kekurangan dalam kiraan jumlah yang dikatakan terhutang dan harus dibayar oleh perayu.

Diputuskan, menolak rayuan tersebut:

(1) Pemiutang penghakiman yang telah memperolehi penghakiman dan telah berdiam selama lebih dari 6 tahun di Malaysia Barat harus mendapatkan kebenaran mahkamah sebelum memulakan tindakan kebankrapan dibawah s 3(1)(i) Akta Kebankrapan 1967 (lihat perenggan 14).

(2) Perkara 97 dan 98 kepada Jadual kepada Ordinan Had Sarawak yang merujuk kepada guaman termasuk tindakan pelaksanaan, dalam lain kata tindakan pelaksanaan penghakiman di Negeri Sarawak dikawal oleh had masa yang dinyatakan di dalam perkara berkenaan (lihat perenggan 21).

(3) Tindakan kebankrapan bukan tidakan pelaksanaan. Oleh demikian ia tidak termasuk dalam makna 'suit' yang dinyatakan dalam Ordinan Had Sarawak (lihat perenggan 22); *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508 diikut.

(4) Perkara yang tinggal adalah yang berkenaan dengan kebenaran tindakan kebankrapan iaitu notis kebankrapan dan petisyen pemiutang penghakiman tidak teratur kerana terdapat kekurangan dalam kiraan jumlah yang dikatakan dihutang dan harus dibayar oleh perayu adalah lambat untuk perayu membangkitkannya sekarang. Ia seharusnya dibangkitkan dan ditentang di peringkat notis kabankrapan mengikut cara yang betul seperti yang dinyatakan di dalam Kaedah-Kaedah Kebankrapan 1969 (lihat perenggan 25); *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298 dan *J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177 diikut.]

Notes

For cases on bankruptcy notice and petition, see 1 *Mallal's Digest* (4th Ed, 2002, Reissue) paras 2485-2486.
For cases on leave to issue execution more than six years after judgment, see 2(3) *Mallal's Digest* (4th Ed, 2001, Reissue) paras 2325–2328.

Cases referred to

Datuk Lim Kheng Kim v Malayan Banking Bhd [1993] 2 MLJ 298 (folld)
J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd [2000] 3 MLJ 177 (folld)
Kong Ming Bank Berhad v Sim Siok Eng [1982] 2 MLJ 205 (refd)
Neo Ong Tew v Neo Ong Hee [1926] 1 SSLR 120 (refd)
V Gopal; Ex P Bank Buruh (M) Bhd, Re [1987] 1 CLJ 602 (refd)
Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd [1989] 3 MLJ 508 (folld)

Legislation referred to

Bankruptcy Rules 1969 r 117
Bankruptcy Act 1967 s 3(1)(i)
Rules of the High Court 1980 O 46 r 2(1)(a)
Sarawak Limitation Ordinance Schedule, items 44, 97, 98
Straits Settlements Limitation Ordinance No 56 s 2

Venu Narir with Bong Ah Loi (Bong & Co) for the appellants.
Gabriel Kok (Khoo & Co) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] On 23 September 1992, the respondent before us obtained judgment against the appellant for a sum of M$5,283.45 together with interest on that

sum at 1.5% per month. For completeness, this is what the judgment in question said:

> IT IS THIS DAY ADJUDGED that the first and second Defendants do pay the Plaintiff the sum of M$5,283.45 together with interest thereon at the rate of 1.5% per month from 27 February 1992 until full payment and legal fees and disbursements incurred by the Plaintiff in enforcing payment calculated on a solicitor and client basis in the sum of M$446.67 and costs of M$216.

[3] On 5 October 1999, the respondent took out a bankruptcy notice. The foundation for that notice was the judgment already averted to. But by October 1999 the sum owing on that judgment, according to bankruptcy notice was M$12,345.72. Particulars of that sum was set out in the schedule to the notice. The notice was duly served on appellant. He did nothing. So, in accordance with s 3(1)(i) of the Bankruptcy Act 1967 the appellant had committed an act of bankruptcy. This entitled the respondent to present a creditor's petition to have the appellant adjudicated a bankrupt and to have a receiving order passed against his assets. This the respondent did.

[4] On 6 March 2000, it presented a creditor's petition. The appellant then gave notice under r 117 of the Bankruptcy Rules 1969 of his intention to oppose the respondent's petition.

[5] The petition came on for hearing before the deputy registrar, who after argument, granted the petition and made receiving and adjudication orders against the appellant.

[6] The appellant then appealed to the learned judicial commissioner in chambers. At the conclusion of the argument, the learned judicial commissioner dismissed the appeal and affirmed the order of the learned registrar.

[7] The appellant now appeals to us. This appeal was heard on 7 October 2002 and by reason of certain clarification we required on the law obtaining in the state of Sarawak, we adjourned the appeal to this morning.

[8] Mr Venu Nair, counsel for the appellant and Mr Gabriel Kok, counsel for the respondent have taken advantage of the adjournment to prepare the relevant authorities and make them available to us. We are grateful for their assistance without which this *ex tempore* judgment would not be possible.

[9] Several points have been raised in support of the appeal. However, we need only confine ourselves to two main arguments presented to us. The first of these relates to the issue of limitation; and the second to the propriety of the bankruptcy proceedings. We will take the limitation point first.

[10] Mr Venu Nair in a carefully developed argument has submitted that the bankruptcy proceedings in the High Court Miri were invalid because the bankruptcy notice was issued after the expiry of six years from the dateof judgment on which it was based. He pointed out that the judgment was obtained on 23 September 1992 whereas the bankruptcy notice was only issued on 5 September 1999 after the expiry of more than seven years. Atthe centre of Mr Nair's argument lies the proviso to s 3(1)(i) of the Bankruptcy Act 1967, which is in the following terms:

> Provided that for purposes of this paragraph and of section five person who is for the time being entitled to enforce any final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order.

[11] The words in the proviso to which we have lent emphasis were considered in two cases.

[12] In *Re V Gopal; Ex P Bank Buruh (M) Bhd* [1987] 1 CLJ 602, it was held that these words required a judgment creditor to obtain leave to issue execution under O 46 r 2(1)(a) of the Rules of the High Court 1980 before taking out bankruptcy proceedings on a judgment entered more than six years earlier. VC George J (as he then was), after discussing the English cases on the parallel English provision said:

> What the proviso to section 3(1)(i) does is to define a creditor who has obtained a final judgment or final order within the meaning of that section as being 'any person who is for the time being entitled to enforce a final judgment or final order'. On the day that the bankruptcy notice was served, since six years had lapsed from the date of the judgment the petitioner was not entitled to enforce the judgment as he had not obtained the requisite leave as prescribed by Order 46 rule 2(1)(a).

[13] Again, in *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508, Edgar Joseph Jr J (as he then was) held in terms similar to VC George J in *Re V Gopal* save that his lordship expressed the view that the material date to determine whether a creditor is entitled to issue a bankruptcy notice is the date on which the notice was issued and not the date it was served on the judgment debtor.

[14] To re-iterate, following the foregoing two decisions, a creditor who has obtained a judgment and sat on it for more than six years in West Malaysia must obtain leave of Court before he can commence bankruptcy proceedings under s 3(1)(i) of the Bankruptcy Act 1967.

[15] The critical question in the present appeal is, however, whether the judgment obtained by the respondent is affected adversely by a period of limitation under the Sarawak Limitation Ordinance (Cap 49). We say that because the respondent in the present case is, in the words of proviso of s3(1)(i), a person who is 'for the time being entitled to enforce a final judgment'. This is by reason of the respondent having on 15 September 1999 obtained leave to enforce the judgment entered against the appellant.

[16] Turning now to the Sarawak Limitation Ordinance, Mr Venu Nair of counsel for appellant has argued that it is not open to the respondent to enforce the judgment because more than six years have lapsed under item 97 of the Schedule to that Ordinance. Item 97 reads:

Description of suit	Period of limitation	Time from which period begins to run
Suit for which no Period of limitation is provided elsewere in this Schedule	Six years	When the right to sue accrues.

[17] Counsel also relies on item 44 of the same Schedule which provides for a period of limitation of three years and reads as follows:

Description of suit	Period of limitation	Time from which period begins to run
For money payable for interest upon money due from the defendant to the plaintiff	Three years	When the interest becomes due.

[18] Now, both these items refer to a 'suit', which appears at the heading of the second column of the schedule. So too does item 98 relied upon by counsel for the respondent. That item reads as follows:

Description of suit	Period of limitation	Time from which period begins to run
Upon a judgment obtained in Sarawak, or any judgment within the meaning of the Reciprocal Enforcement of Judgments (Superior Courts) Ordinance 1961, registered in Sarawak pursuant to that Ordinance, or a recognizance	Twelve years	The date of the judgment or recognizance

[19] Before dealing with the question as to which is the relevant item, it is in our judgment imperative to address our mind to the definition of 'suit' in the Ordinance. It is defined as follows:

> 'suit' include any action or other proceeding.

[20] Now, these words were considered by the Straits Settlements Court of Appeal in *Neo Ong Tew v Neo Ong Hee* [1926] 1 SSLR 120. Section 2 of the Straits Settlements Limitation Ordinance No 56 defined in terms identical the word 'suit' to the Sarawak Ordinance. Deane J when interpreting 'suit' said:

> a proceeding by way of execution of a judgment is therefore a suit, and will fall to be dismissed if instituted after the period of limitation prescribed by the schedule.

[21] We are persuaded by the view of the Straits Settlements Court of Appeal in *Neo Ong Tew*'s case. Accordingly, in our judgment, item 97 and 98 to the Schedule of the Sarawak Ordinance which refer to suits, include execution proceedings. In other words, an execution proceeding upon a judgment in the State of Sarawak is caught by the limitation period prescribed by the appropriate item. We use the expression 'appropriate item' advisedly because we find it unnecessary in the present appeal to identify the precise item which applies in the present instance. In our view, the important

question is whether bankruptcy proceedings are execution proceedings within the Ordinance, ie within the definition of 'suit'. In addressing the question, we bear in mind the caveat imposed upon us by Lord Scarman in *Kong Ming Bank Berhad v Sim Siok Eng* [1982] 2 MLJ 205, at p 206:

> The Limitation Ordinance of Sarawak, which is similar to other limitation enactments in Malaysia, is based not on the English Statute but on the Indian legislation, the structure of which it follows closely. Argument by analogy from the English law may result, therefore, in error, whereas the Indian and Malaysian case law is a useful guide to the interpretation of the Ordinance.

[22] Returning to the question posed, we are of the view that bankruptcy proceedings are not execution proceeding and do not therefore come within the definition of 'suit' as defined by the Sarawak Limitation Ordinance. Inarriving at this conclusion, we agree with and find support for our view, from the judgment of Edgar Joseph Jr J in *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508. His Lordship there said:

> Before I embark upon a consideration of the UK decisions, I would make the preliminary observation that the issue of a bankruptcy notice is not execution to enforce a judgment.

[23] Since the Bankruptcy Act 1967 and the Rules thereunder apply throughout Malaysia, the expression bankruptcy proceedings must have the same and uniform meaning in the states of West Malaysia as well as the states of Sabah and Sarawak. If they do not include execution proceeding in the states of West Malaysia they cannot include execution proceeding in Sabah and Sarawak. In our judgment, therefore, the Limitation Ordinance of Sarawak has no application to the facts of the present appeal.

[24] Since the respondent has already obtained leave, and as we have earlier observed, is entitled to commence bankruptcy proceedings, and the Sarawak Limitation Ordinance not applying to the appellant's case, we reject the argument by learned counsel on the limitation point.

[25] The only remaining point, as we have said, has to do with the propriety of the bankruptcy proceedings. Mr Bong Ah Loi following on his learned senior, submitted that the bankruptcy notice and petition in the present instance were not in order because there were deficiencies in the mathematical calculation of the sum said to be due and payable by his client. The short answer to this is that it is too late in the day for the appellant to raise this point. Binding authority is against him. We refer to *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298, where it was held that the objections in the nature of the one now raised by the appellant should have been taken and challenged at the bankruptcy notice in the appropriate way prescribed by the Bankruptcy Rules 1969. We find it unnecessary to regurgitate what was there said. This court has already summarised the effect of several cases dealing with the procedural aspects of bankruptcy proceedings in *J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177. We find that nothing further need to be added to what was there said.

[26] For the reasons already given, this appeal fails. We would now invite our learned brother Richard Malanjum JCA to deliver the formal order that this court will now make on the appeal.

Richard Malanjum JCA:

[27] Appeal dismissed. Order of the High Court affirmed. Costs to the respondent, deposit to respondent on account of taxed costs.

Appeal dismissed.

Reported by AG Kalidas